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No. 87-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARCO OIL AND GAS COMPANY, DIVISION OF ATLANTIC RICHFIELD COMPANY,
Petitioner,
v.
WILLISTON BASIN INTERSTATE PIPELINE COMPANY AND THE FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER TO BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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REPLY BRIEF OF PETITIONER TO BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

Pursuant to Rule 22.5, Petitioner ARCO Oil and Gas Company, Division of Atlantic Richfield Company ("ARCO") replies to the Brief for the Federal Energy Regulatory Commission filed on December 24, 1987.

STATEMENT

All parties before this Court—ARCO, Williston Basin Interstate Pipeline Company ("Williston") *and* the Federal Energy Regulatory Commission ("Commission")—

agree the decision below is *incorrect* and was wrongly decided.[1]

ARCO and Williston have shown the importance of this case in the administration of Section 107(c)(5) of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3317(c)(5), and more than ample reasons warranting review by this Court from the respective viewpoints of a producer-seller and a pipeline-purchaser under contracts subject to Section 107(c)(5).[2] Only the Commission disagrees, asserting review is not warranted (Comm. Br. 4, 6-7).

ARCO addresses the Commission's position *infra*. However, ARCO first respectfully calls attention to relevant judicial action occurring in other cases involving Section 107(c)(5) of the NGPA since ARCO's Petition was filed on September 28, 1987:

(1) On November 30, 1987, this Court granted the Commission's Petition for a Writ of Certiorari to review the decision in *Martin Exploration Management Company* v. *FERC*, 813 F.2d 1019 (10th Cir. 1987), which involves, *inter alia*, status of gas classified under Section 107(c)(5) of the NGPA and the Regulations thereunder. This Court did so after review of the Commission's assertions in its Petition as to *continuing* importance of Section 107(c)(5) of the NGPA and of Section 107(c)(5) gas in the marketplace.[3]

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[1] See ARCO's Pet. 10-18; Williston's Brief In Response 1-2, 12; Comm. Br. 4 and n.1, 4.

[2] See ARCO's Pet. 17-18; n.28, 24-25; Williston's Brief in Response 2-3, 16, 17.

[3] See Commission Petition in *FERC* v. *Martin Exploration Management Company*, No. 87-363. There, the Commission presented a *separate* question as to Section 107(c)(5) (Pet. (i)) and discussed Commission authority under Sections 107(c)(5), 501, and 503 of the NGPA without reference to the holding below in *this* case (Pet. 5, n.4; 6, n.8; 12, n.12; 13, n.19; 18-19, n.21; 20, n.23; 20, 22). Discussing one question involving Sections 107(c)(5) and

(2) On November 17, 1987, the Court of Appeals for the District of Columbia Circuit issued its opinion in *Midwest Gas Users Association* v. *FERC*, No. 86-1140 (see Comm. Br. 5). There, the court sought to distinguish the opinion below in this case, but its decision presents conflicts with that opinion as to Commission Section 501 rulemaking powers to implement Section 107(c)(5) of the NGPA and as to the regulations thereunder.

(3) On January 4, 1988, the Commission filed a petition for rehearing and suggestion for rehearing *en banc* in the *Midwest* case, asserting error in that court's holding reversing the Order No. 99 regulations in part; that such ruling on that issue ". . . unless overturned, *will impair the fair and equitable administration of important provisions of the NGPA by the Commission*" ("Petition of the Federal Energy Regulatory Commission for Rehearing and Suggestion for Rehearing *En Banc*," *Midwest Gas Users Association, et al.* v. *Federal Energy Regulatory Commission*, No. 86-1140 (D.C. Cir.), 2 (emphasis added); and that further review was foreclosed by the affirmance of the Order No. 99 regulations in *Pennzoil Co.* v. *FERC*, 671 F.2d 119 (5th Cir. 1982) (Pet. 14-15).

These recent developments add to the reasons stated in ARCO's Petition as to importance of constructions of Section 107(c)(5) of the NGPA and why the Petition should be granted, and negate the Commission's assertions that this case does not warrant the attention of this Court.

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503 of the NGPA (both here involved), the Commission relies upon its authority to implement regulations through rulemaking under Section 501 of the NGPA, but *without* any reference to limitations imposed by the holding below in this case on such Section 501 rulemaking authority as to matters involving Section 503 of the NGPA (see Pet. n.21, 18-19).

ARGUMENT

The Commission's position is that the plainly erroneous construction of Sections 107(c)(5), 501, and 503 of the NGPA below should be left standing because, at least presently, its belief is that the holding will be of "little legal or practical moment" (Comm. Br. 4). Alleged predicates for this startling conclusion disappear when analyzed in the contexts of the realities of the impact of the holding below and of the Commission's inability to control the ultimate results involved.

1. Consequences of the holding below hardly are of "little practical moment" to gas producers and pipelines affected:

(1) Prior to issuance of the mandate below on July 15, 1987, state or local jurisdictional agencies and the Commission had approved designations of at least 199 "tight formations" by orders issued in Section 501 rulemaking proceedings, not under Section 503 procedures which the court below held were applicable (App. 10a-12a, 104a-211a). Contrary to the Commission's assertions that the impact of the holding below on these formations orders is "wholly theoretical" (Comm. Br. 7), each of these rulemaking orders is now open to the claim of invalidity based on the holding below (*cf.* Comm. Br. 7 and n.3, 5-6).

(2) If nothing else squarely illustrates such impact, the complaint in *Williston Basin Interstate Pipeline Company and MDU Resources Group, Inc.* v. *Burford*, No. CA87-1757 (JHP) (D.D.C.) filed June 29, 1987, provides far more than a roadmap of "practical moment" for attacks upon these Section 501 rulemaking orders issued prior to release of the opinion below (*cf.* Comm. Br. n.3, 5-6).[4]

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[4] In that case, Williston brought an action for declaratory judgment against the Director of the Bureau of Land Management, the Secretary of The Interior, the Commission and its members. The

(3) Validity of new Commission regulations issued on July 29, 1987, in deference to what the Commission here agrees was an erroneous interpretation of the NGPA by the court below, does remain unknown (Comm. Br. 6-7), but so does validity of orders designating "tight formations" subsequently issued solely under the Section 503 procedures (*e.g., Colorado Oil and Gas Conservation Commission (The Dakota and Morrison Formations, Garfield and Mesa Counties)*, 40 FERC (CCH) ¶ 61,101 (1987)); and the Commission here appears to be wholly indifferent to clouds of uncertainty its position thus creates for producers, pipelines, and consumers affected by such orders (Comm. Br. 6-7).

(4) The Commission ignores the question of retroactive application of the holding below to its orders issued under Section 501 rulemaking prior to July 29, 1987, even though its initial effort to apply that holding prospectively only is not final and has no judicial approval to date (see, *e.g., Texas Railroad Commission, Travis Peak Formation*, "Notice of Preliminary Finding and Order Terminating Hearing," July 29, 1987, 52 Fed. Reg. 29245 (Aug. 6, 1987)).

(5) The notion that there are likely to be fewer designations of "tight formations" in the future, predicated solely on figures for 1985, 1986, and 1987 (Comm. Br., n.5, 6-7), a time of temporary gas surplus, is wholly at

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Commission is seeking to extricate itself as a defendant, leaving defense of the case to the Bureau of Land Management and The Department of The Interior. In support of its Motion to dismiss the Commission and its members as defendants filed September 18, 1987, the Commission asserts that *if* the plaintiff in this collateral proceeding can succeed in convincing the court of denial of due process, the plaintiff then can obtain a "new hearing" and the Commission can reopen its own docket under Section 503(d) of the NGPA (Memorandum of Commission in support of Motion to Dismiss, 12-13). By order of the court and parties' stipulations, the time for plaintiff's answer to this Commission Motion has been extended to February 16, 1988.

odds with conclusions by Congress in enacting Section 107(c)(5), the findings of the Commission when it issued Order No. 99,[5] and the continuing long-term importance of "tight formation" production, under some regulatory certainty, in warding off future shortages and minimizing foreign energy imports.[6]

In brief, the Commission's effort here to brush off the holding below as of "little legal or practical moment" simply does not jibe with what is occurring in its own proceedings and in litigation already begun because of the holding below. While this Court possibly may consider an erroneous construction of a federal regulatory statute, standing alone, as insufficient reason to grant a petition, the holding below impacts upon scores of proceedings, all segments of the natural gas industry, and regulations in effect almost eight years. This Court has considered such ramifications of an erroneous construction of a statute, resultant uncertainty for hundreds of transactions, generation of unnecessary litigation, proliferation of agency proceedings and reversal of long-standing agency construction as additional, supportive reasons warranting the granting of a petition and this Court's review. See *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 237 (1964); *FTC* v. *Jantzen, Inc.*, 386 U.S. 228, 229 (1967); *Morton* v. *Ruiz*, 415 U.S. 199, 201-202 (1974); *Laing* v. *United States*, 423 U.S. 161,

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[5] The Commission then estimated ". . . that between 200 and 700 trillion cubic feet of natural gas is trapped in tight formations in the United States. *Depending upon the applicable price incentives, it is estimated that the gas recoverable in tight formations might equal the amount of proven domestic conventional reserves*" (App. 31a, emphasis added).

[6] As to importance of domestic gas in reversing the situation in which annual consumption exceeds domestic discoveries and in reducing reliance upon foreign energy sources, see "Gas Supplies of Interstate Pipeline Companies 1984," DOE/EIA-0167 (84), pp. vii, 3, 7, 37; and "Annual Energy Outlook, 1985, With Projections To 1995," DOE/EIA-0383 (85), pp. 1, 15, 33, and 36.

167 (1976). The Court should give such weight to these additional reasons which exist here and should grant the Petition in this case.

2. The November 27, 1987 decision in the *Midwest* case, *supra*, does not "narrow" the holding below (*cf.* Comm. Br. 5), but, to the contrary, is in conflict with the opinion in this case as to Sections 107(c)(5), 501, and 503 of the NGPA.

In *Midwest*, the court of appeals first said it *distinguished* between that case and this *Williston Basin* case (slip op., pp. 16-17), which is *not* applying a prior decision "narrowly" (*cf.* Comm. Br. 5). Thereafter, the *Midwest* court treated Commission orders designating "tight formations" which had been issued under the Section 501 rulemaking process as valid, despite the requirement for Section 503 procedures under the holding in this case (slip op., 17); upheld the Commission's "negotiated-price" requirement in the Order No. 99 regulations (see slip op., pp. 17-20, and App. 33a, 54a-58a, 99a); but reversed as to certain other sections of the Order No. 99 regulations (slip op., pp. 28-33).

Most important, in its opinion, the *Midwest* court referred to the broad latitude granted to the Commission under Section 107(c)(5) as to substantive orders *and* procedures to implement that section of the NGPA.[7] This view of the statute obviously conflicts with the narrow, erroneous reading of Section 107(c)(5) and Commission Section 501 rulemaking power by the court below in this

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[7] For example, the *Midwest* court states that ". . . Congress in § 107(b) explicitly gave the Commission the authority to establish incentive prices 'by rule or order' rather than by individualized adjudication . . ." (slip op., p. 19), and: "In the case of § 107(a)(5) [sic] gas, however, Congress left it entirely to FERC to determine both the qualifications for eligibility and the prices that could be charged" (slip op., p. 23; see also slip op., p. 32). None of the panel in the *Midwest* case was on the panel in this case below (see slip op., p. 3 and App. 2a).

case. See also *Pennzoil Co.* v. *FERC*, 671 F.2d 119 (5th Cir. 1982), in which the Order No. 99 regulations were upheld; the "jurisdictional" issue raised below, *sua sponte*, could have been raised there but was not;[8] and the Commission's broad Section 501 rulemaking power to implement Section 107(c)(5) was fully recognized (see Pet. 19-22).

Even if the Commission currently perceives no conflicts in *Pennzoil*, *Midwest*, or other cases, the Commission aptly advised this Court in the *Martin* case, *supra*, that questions involving widely applicable provisions of the NGPA should be reviewed by this Court without awaiting a "clear conflict" in the circuits (Comm. Pet. in No. 87-363, 22). That "advice" is particularly relevant here where all parties agree the court below misconstrued the NGPA, and two who were opposing parties below urge the granting of the Petition.

3. The Commission never says that its rulemaking powers clearly are left intact and unaffected by the holding below. Instead, all of the Commission's statements are qualified by words such as "virtually" (Comm. Br. 4) or "not significantly" (Comm. Br. 5). The fact is, however, that the Commission has yet to feel the full constraints implicit in the opinion below and now available as authority to set aside regulations issued by rulemaking to implement other provisions of the NGPA.

Unless reviewed and reversed by this Court, the tattering of Section 501 below can well turn into wholesale ripping, perhaps belatedly bestirring the Commission to recognize that it should have joined ARCO and Williston in seeking timely review and reversal in this case to pre-

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[8] When *Pennzoil* became final, the "jurisdictional" issue raised below *sua sponte* should have foreclosed collaterally. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 335-337, 339-341 (1958); *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497-498, 501-502 (1955).

serve its Section 501 rulemaking authority (see Pet. 17, 19-22, 24).

4. In short, the Commission's brief begs all of the relevant questions. The Commission (1) agrees that the court below misconstrued the NGPA, *and* (2) states that the Commission's "view of the merits . . . is similar to that advanced by petitioner (see Pet. 10-17)" (Comm. Br. 1, n.1).

Having so agreed, the Commission then should support the granting of the Petition on the basis of a realistic assessment of the impact of the holding below on its own current and future proceedings, in generating collateral litigation such as that already begun against the Commission and The Department of The Interior, and upon the natural gas industry here represented by ARCO and Williston.[9]

The Commission's arguments, in sum, are without merit and do not present the Court with any sound, "legal," or "practical" bases for denying the Petition.

CONCLUSION

For the reasons stated in ARCO's Petition and this Reply Brief, and in view of Williston's concurrence with ARCO and the Commission's agreement with ARCO and Williston that the decision of the court of appeals is erroneous, this Court should grant ARCO's Petition, con-

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[9] Here, Williston purports to speak as to impact of the decision below upon pipelines, distributors, and ultimate consumers. ARCO shares certain of Williston's concerns and also envisions the converse of the situation below—denial of judicial review under Section 503 where the Commission affirms a jurisdictional agency's refusal to designate a formation as eligible under Section 503. Both apparently share the view this Court often has stated, which was ignored below, that construction of a statute to bar judicial review should not be presumed, but found only by expression and "clear and convincing evidence." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967).

sider the "Questions Presented" by ARCO (Pet. i), and reverse the court of appeals on those questions.

Respectfully submitted,

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